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No. 99-545

IN THE
Supreme Court of the United States

STEAMFITTERS LOCAL UNION NO. 420 WELFARE FUND, *et al.*,
Petitioners,
v.
PHILIP MORRIS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA; LABORERS INTERNATIONAL UNION OF NORTH AMERICA; INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & REINFORCING IRON WORKERS; INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS; AND OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA IN SUPPORT OF PETITIONERS

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November 23, 1999

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; the Laborers International Union of North America; the International Association of Bridge, Structural & Reinforcing Iron Workers; the International Union of Elevator Constructors; and the Operative Plasterers' and Cement Masons' International Association of the United States and Canada ("International Unions") respectfully move this Court for leave to file the attached brief *amicus curiae* in support of the petition for writ of *certiorari*. The consent of Petitioners to the filing of this brief has been obtained and the letter reflecting such consent has been filed with the Clerk of the Court. The consent of Respondents has been sought but has not been granted, nor has it been refused.

Amici curiae are five international unions which among them represent over 1.1 million blue collar workers nationwide in construction, manufacturing and other major industries. *Amici curiae* and other unions have for many decades negotiated for the creation of multiemployer health and welfare funds to provide for the health needs of workers and their families. Accordingly the International Unions and their members have a vital interest in the instant case, which threatens to curtail the ability of multiemployer health plans to redress financial injury to plan assets. If the unprecedented restrictions which the lower federal courts have recently imposed on the right of plan trustees to bring suit are allowed to stand, then the economic soundness of these trust funds will be seriously undermined.

The International Unions believe that they are uniquely situated to offer insight into the nature and functions of multiemployer health and welfare plans, which are both a critical component of national health care and a successful model for America's primarily private, primarily employment-based health care system. The International Unions therefore respectfully move this Court for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

Amici curiae are five international unions which represent over 1.1 million blue collar workers nationwide in

[1] *Amici curiae* state, pursuant to Sup. Ct. R. 37.6, that this brief was not authored in any part by counsel for any party. Moreover, no person or entity other than *amici curiae* and their counsel made

construction, manufacturing and other major industries. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry represents 300,000 workers in all aspects of the plumbing and pipe-fitting trades. The Laborers International Union of North America represents 600,000 laborers. The International Association of Bridge, Structural & Reinforcing Iron Workers represents 150,000 tradesmen. The International Union of Elevator Constructors represents 27,000 workers in the elevator, escalator, and related industries. The Operative Plasterers' and Cement Masons' International Association represents over 39,000 workers in the plastering and cement masons trades.

For the better part of the twentieth century, *amici curiae* and other unions have negotiated for the creation of multi-employer health and welfare funds to provide for the health needs of workers and their families. Such funds, often referred to as Taft-Hartley plans, are the primary or sole source of health coverage for over 30 million Americans, including those represented by *amici curiae*. Taft-Hartley plans are funded by collectively bargained employer contributions which are placed in trust and managed for the sole and exclusive benefit of employees and their dependents. Such plans cover workers in industries as diverse as building and construction, retail, food, clothing and textiles, transportation, mining, services, entertainment, longshoring, maritime, hotel and restaurant, and manufacturing. If not for the existence of such plans, many working families would lack adequate health coverage because of the transient employment patterns and the small size of many employers in these industries. The plans have served as a model for the

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a monetary contribution to the preparation or submission of this brief. The consent of Petitioners to the filing of this brief has been obtained. The consent of Respondents has been sought but has not been granted.

nation's primarily private, primarily employment-based health care system.

The decision below and similar recent decisions of the Second, Seventh and Ninth Circuits deny to Taft-Hartley, multiemployer health plans the ability to pursue RICO and antitrust claims for economic injury to trust fund assets caused by the intentional wrongful acts of tobacco industry defendants. As *amici curiae* discuss below, the denial of these claims on the basis of "remoteness"—which the teachings of this Court identify as a policy-driven doctrine —flies in the face of national health care policy and its reliance on the Taft-Hartley plan model. If, contrary to established precedent, Taft-Hartley plans cannot employ remedial statutes to redress intentional injury to plan assets, then the economic soundness of these trust funds will be seriously undermined. Taft-Hartley plans have been a direct target of the tobacco industry's campaign of deception, and they have incurred billions of dollars in additional health care costs because of the industry's intentional, unlawful conduct.

Amici curiae believe that the long experience they and their 1.1 million-strong members have had with the Taft-Hartley model uniquely situate them to offer insight into the extremely significant issues presented by this petition. This brief is submitted out of a deep concern that a restrictive application of the "remoteness" doctrine by the lower federal courts may jeopardize the continued viability of entities that are a cornerstone of modern health care.

STATEMENT OF THE CASE

Amici curiae rely on the Statement of the Case submitted by Petitioners Steamfitters Local Union No. 420 Welfare Fund, *et al.*

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE DECISION BELOW IS DEMONSTRABLY WRONG AND REACHES A RESULT DIRECTLY CONTRARY TO THE RULINGS OF THIS COURT.

A. The Health Fund Plaintiffs Are Trusts Governed by ERISA, the Taft-Hartley Act and the Common Law of Trusts.

The plaintiff funds are established by, and administered and maintained according to the terms of, written declarations of trust. Each fund has a named fiduciary, typically a board of trustees appointed half by labor and half by management. The funds are governed by the terms of Section 302 of the Labor Management Relations Act of 1947 ("Taft Hartley Act"), 29 U.S.C. § 186, and by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.* While these statutes are detailed and far-ranging, Congress intended the federal courts to draw heavily on traditional trust law principles to fill any statutory gaps. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). This Court has strongly relied on trust principles when assessing the right of Taft-Hartley trustees to assert causes of action to protect trust assets. *See Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

In the Taft-Hartley Act, Congress required that collectively bargained welfare funds be established as formal trusts, that plan assets be held in trust, and that they be administered for "the sole and exclusive benefit" of employees and their dependents. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (citing 29 U.S.C. § 186(c)(5)). ERISA largely codified the trustees' strict fiduciary duties, while allowing gaps to be filled in by reference to tradi-

tional trust law. *Amax Coal,* 453 U.S. at 332-34. Fund trustees bear an unwavering duty of loyalty to trust beneficiaries, to the exclusion of all others including each trustee's appointing party. *Amax Coal,* 453 U.S. at 329-30 (citing, *inter alia,* RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1957) and 2 A. Scott, *Law of Trusts* 170 1967)). Trust fund assets, accordingly, may not inure to the benefit of union or employer, but must be held in trust, and preserved and applied for the exclusive benefit of the trust beneficiaries. *Amax Coal,* 453 U.S. at 329-32; *Lewis v. Benedict Coal Corp.,* 361 U.S. 459, 468-70 (1960).

Funding for multiemployer plans comes from employer contributions, the level of which is collectively bargained, generally in lieu of additional wages to the employees. *See Lewis v. Benedict Coal Co.,* 361 U.S. at 469. Once paid, contributions become plan assets which may not inure to the benefit of the employer. ERISA § 403(c), 29 U.S.C. § 103(c); *Amax Coal,* 453 U.S. at 333 (quoting ERISA Section 403(c)(1)). Residual assets cannot be returned to contributing employers, even upon termination of a multiemployer welfare plan. 26 C.F.R. § 1.501 (c)(9)-4(d).

While ERISA trustees have substantial control over what plan of benefits will be provided to participants and beneficiaries, they have no power to fix or to raise contribution rates, which is a matter left to union and management negotiators. *See Amax Coal,* 453 U.S. at 336. Trustees have authority to defray reasonable expenses of administering plans and to invest assets in a manner that will minimize the risk of large losses. 29 U.S.C. § 1104 (a)(1). In enacting ERISA, Congress had among its objectives "to make applicable the law of trusts [and] to establish uniform fiduciary standards to prevent trans-

actions which dissipate or endanger plan assets." *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 635 (W.D. Wis. 1979) (quoting U.S.C.C.A.N. 5186, 93rd Cong. 2d Sess. (1974)). If the resources of such a trust become insufficient to support the plan of benefits and no collectively bargained contribution increase is forthcoming, the trustees' alternative is to lower benefits *See Robbins v. Lynch Truck Serv.*, 836 F.2d 330, 332-33 (7th Cir. 1988).

ERISA recognizes that an employee welfare benefit plan may either use trust assets directly to pay for medical care (as most of them do), or purchase insurance for that purpose. 29 U.S.C. § 1002(1) ("welfare benefit plan" defined as plan which provides benefits "whether . . . purchased through the purchase of insurance or otherwise"). Whereas insured plans use plan assets to purchase insurance to cover benefits, *see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985), self-insured plans pay benefits directly from the *res* of the trust, *i.e.*, "contributions in, benefits out." *See Central States S.E. & S.W. Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1151 (7th Cir. 1989). In all cases, the plans depend for their continued viability on the financial soundness of the trust.

B. Taft-Hartley Plans Provide Health Coverage for a Substantial Sector of the Public that Would Otherwise Be Unable to Secure Adequate Coverage.

1. *As Pooled Funds, Taft-Hartley Plans Provide Both Portability and Economies of Scale that Are Essential to the Availability of Health Coverage for Much of the American Workforce.*

All of the collectively bargained employer contributions to a multiemployer health plan are pooled and invested as assets of the trust. It is from this pool that

benefits are paid to covered workers, retirees and their dependents to the extent that the plan is self-funded, and from which premiums are paid to the extent that the plan's benefits are insured through contracts with insurance companies or benefits are delivered through managed care organizations. Operating expenses are also paid from this asset pool. *See* NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS: AN OVERVIEW OF THEIR OPERATIONS, REGULATIONS AND CONCERNS 5 (1997) [hereinafter OVERVIEW].

This pooling characteristic of multiemployer plans provides workers with true portability of health coverage. See JUDITH F. MAZO, *Multiemployer Health Plans: Why and How Do They Work?*, 10 BENEFITS L. J. 47, 53-56 (1997). A covered worker who changes from one contributing employer to another maintains seamless coverage under a plan despite frequent changes in employment. This portability is essential for workers in industries characterized by mobile and intermittent patterns of employment, such as building and construction, entertainment, clothing, and longshoring.

Participation in a multiemployer health plan also enables small employers, which would be unable to maintain a separate health plan, to provide benefit coverage for their workers. By providing a central fund through which portable coverage is provided to workers as they move from one contributing employer to another, Taft-Hartley plans effectively treat all contributing employers —scores, hundreds, or even thousands of employers—as a single employer for purposes of providing health and welfare benefits coverage to workers, dependents and retirees. Thus, Taft-Hartley plans offer substantial economies of scale in administration and enhanced purchasing power with health care providers, insurers and managed care organizations.

Taft-Hartley, multiemployer plans have been so successful as a vehicle for providing health care coverage that Congress has considered them as a model for efforts to expand health care coverage for the more than 40 million uninsured Americans, most of whom work for small employers. *See, e.g.*, H.R. 2990, 106th Cong., 1st Sess., Title II, as passed by the House of Representatives on October 6, 1999, 145 CONG. REC. H9431, H9434-H9443, H9473 (daily ed., October 6, 1999).

2. ***Taft-Hartley Funds Have Limited Means Available to Deal with Unexpected Diminishments of Trust Assets.***

Over the years, Taft-Hartley trustees, with professional assistance, have designed health and welfare programs that balance the benefit needs and wants of workers with the financing that can be provided by collectively bargained contributions. Given that labor representatives (usually elected union officers) make up one-half of each board of trustees, the tendency is for a board to adopt the most generous benefit package that a plan can reasonably afford. *See* OVERVIEW, supra, at 8. Thus, for those workers, dependents and retirees that they serve, Taft-Hartley plans provide significant health care security and hold an important place in the national economy.

The trustees' budget balancing, however, can be upset by unexpected declines in contribution income or by unusual increases in cost. Often, a plan may experience both, since an economic recession in the industry not only tends to cause a reduction in contribution income, but also tends to prompt an increase in benefits utilization by idled workers. *See* MAZO, *supra*, at 51-52. Plans can take steps to protect against economic adversity, such as maintaining reserves, obtaining stop-loss insurance, or insuring some or all of the plan's benefits; however, such protective

devices are not always appropriate or sufficient. *See* OVERVIEW, *supra*, at 8-9. Trustees have additionally had to rely upon other tools to maintain a plan's viability in times of economic adversity, such as adjustment of eligibility rules (*e.g.*, requiring more covered employment for benefit eligibility), reduction of benefit levels, increases in out-of-pocket charges, and elimination of particular benefits.

Trustees may also request the bargaining parties to negotiate an increase in the collectively bargained contribution rate. However, it may take months or even years to effectuate such an increase, particularly where the contribution rate is fixed for the term of the collective bargaining agreement and where the plan receives contributions pursuant to many collective bargaining agreements with differing expiration dates and terms. More importantly, a contribution increase in a very real sense comes out of the paycheck of the worker, since hourly contributions are considered a component of the employee's wage package. *See id.* at 6. Thus, a contribution hike, like a reduction in benefit levels, is likely to hit the worker directly in the pocketbook.

In short, Taft-Hartley health funds are limited in their ability to protect trust assets from the effects of outside forces. Unlike single employer corporate-type plans, multiemployer plans cannot simply dip into the corporate treasury to compensate for unanticipated costs, shortfalls or losses to trust assets. Thus, recognition of the ability of Taft-Hartley funds to pursue legal remedies when such losses are caused by third parties is critical.

C. The Rulings of this Court Favor Allowance of Claims by Taft-Hartley Funds to Redress Injury to the Trust.

The dominant body of common law that applies to employee welfare plans is the traditional law of trusts.

Trust law governed the operation of employee benefit plans under the Taft-Hartley Act, and was largely incorporated into ERISA. As the Supreme Court has stated:

> ERISA abounds with the language and terminology of trust law . . . ERISA legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the law of trusts'. . . . . Given this language and history, we have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 56 (1987) and H. R. REP. No. 93-533, p. 11 (1973)). Moreover, the federal courts are to consult common law trust principles in resolving claims arising from the relationship of an ERISA plan and its participants. *See, e.g., Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.,* 472 U.S. 559, 570 (1985) (Congress invoked common law of trusts to define duties and authorities of trustees); *NLRB v. Amax Coal Co.,* 453 U.S. 322, 329-334 (1981) (the operation of plans is governed by traditional trust law principles); *Rodrigues v. Herman,* 121 F.3d 1352, 1356 (9th Cir. 1997) (fiduciary duty measured by common law trust standard); *Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir. 1982) (citing RESTATEMENT (SECOND) OF TRUSTS, Scott on Trusts, and Bogert on Trusts as determinative of ERISA trustees' duties). Application of trust law furthers the paramount statutory purpose of protecting employees' interests in their continuing medical benefits.

Traditional trust law clearly confers on fund trustees the right to bring tort actions and statutory claims based on injury to the trust *res.* In particular, the RESTATEMENT (SECOND) OF TRUSTS § 285 (1959) expressly provides

that a *fund trustee "can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the trust property free of trust."* (Emphasis added.) With regard to tort actions, "[i]f a third person commits a tort with respect to the trust property, the trustee can maintain such actions at law as he could maintain by reason of his ownership of the property as if he held it free of trust." *Id.*, Comment (a). *See also* Scott & Fratcher, *The Law of Trusts* §§ 280-280.1, Vol. IV, at 6-7 (4th ed. 1987) (trustee is proper party to maintain action against third person who has committed tort against trust property); Bogert & Bogert, *The Law of Trusts & Trustees* § 869, at 114-15 (rev. 2d ed. 1995) (if third person without justification causes harm to trust property, normally only trustee can sue for damages). Accordingly, Taft-Hartley trustees have the clear right to pursue tort actions and other legal claims stemming from damages to the trust.

This Court has long recognized that protection of the soundness of Taft-Hartley health funds lies squarely on the shoulders of the fund trustees and that the trustees must therefore be armed with appropriate and unfettered means of judicial redress. In *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), a Taft-Hartley fund sued an employer for delinquent contributions and the employer claimed that strike damages stemming from the union's misconduct should be allowed as a setoff. Noting that by law the fund existed for the sole and exclusive benefit of the employees and that such provisions for employee security are "a commonplace of modern industrial relations," the Court held that allowance of the setoff would place an unconscionable burden on the employees and their families and would be contrary to national labor policy. 361 U.S. at 465, 468-69. Accordingly, the fund was entitled to collect the full amount of the contributions owed notwithstanding the unlawful strikes and work stoppages. *Id.* at 471.

In *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), the issue was whether Taft-Hartley trustees could seek judicial enforcement of employers' contribution obligations without exhausting the arbitration procedures in the collective bargaining agreement. Noting that there was no indication of such a requirement in the trust agreements themselves, the Court stated:

> This is not surprising. These are multiemployer trust funds. Each of the participating unions and employers has an interest in the prompt collection of the proper contributions from each employer. Any diminution of the fund caused by the arbitration requirements of a particular employer's collective bargaining agreement would have an adverse effect on the other participants. The enforcement mechanisms established in the trust agreements protect the collective interests of the parties from the delinquency of individual employers by allowing the trustees to seek prompt judicial enforcement of the contribution requirements. It is unreasonable to infer that these parties would agree to subordinate those mechanisms to whatever arbitration procedures might be required by a particular employer's collective bargaining agreement.

466 U.S. at 373-74 (footnotes omitted). Thus, once again, the Court refused to place a condition precedent on the trustees' ability to seek judicial relief necessary to protect the trust corpus.

In *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, the Court was presented with the question of whether two large Taft-Hartley benefit plans were entitled to a court order permitting them to conduct a field audit of an employer which included examination of records of all employees, not just those covered by the plans. 472 U.S. 559. The court of appeals held that nei-

ther the trust documents or ERISA authorized an audit of this scope and held that the audit could not be enforced. *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983). This Court reversed, based on the policies of ERISA and on the common law of trusts. 472 U.S. at 568-69.

ERISA, the Court recognized, was grounded in the recognition that "there had been a 'rapid and substantial' growth in the 'size, scope, and numbers' of employee benefit plans and that 'the continued well-being and security of millions of employees and their dependents are directly affected by these plans.' 29 U.S.C. § 1001(a)." 472 U.S. at 569. Further, the Court noted:

> In general, trustees' responsibilities and powers under ERISA reflect Congress' policy of "assuring the equitable character" of the plans. Thus, rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility. Under the common law of trusts, as under the Central States trust agreements, trustees are understood to have all "such powers as are necessary or appropriate for the carrying out of the purposes of the trust." 3 A. Scott, Law of Trusts § 186, p. 1496 (3d ed. 1967) (hereinafter Scott).

472 U.S. at 570 (footnotes omitted).

One of the "fundamental common-law duties of a trustee" incorporated by ERISA and imposed on fund trustees is the duty "to preserve and maintain trust assets." *Id.* at 572. ERISA's fiduciary and other provisions of the Act offered strong support, according to the Court, of the auditing power claimed by the plaintiff funds. *Id.* at 573. The court of appeals' conclusion that other parties, such

as the union, the Department of Labor or the covered employees themselves, would sufficiently protect the needs of the funds in the absence of the full-scope audit power was squarely rejected by the Court, based primarily on the belief that the breadth of the trustees' duties was such that they and they alone were in a position to fully vindicate the rights of the plans and to protect plan assets. *Id.* at 574-79. The Court also rejected the court of appeals' suggestion that the broad audit power should be denied in favor of an after-the-fact remedy which would be less intrusive on sectors of the employer's business which were concededly not covered by the benefit plans. *Id.* at 580. In conclusion, seeing no reason in ERISA or in the plans themselves to limit the audit authority of the trustees, the Court came down squarely on the side of the trustees' right to seek judicial relief. *Id.* at 582.

As these rulings demonstrate, the Court has been consistently mindful of the federal policy favoring protection and preservation of Taft-Hartley plan assets when addressing the right of such plans to seek judicial redress. Despite occasional efforts on the part of lower courts to place conditions on suits by multiemployer plans, the Court has consistently made clear that Taft-Hartley trustees are not to be judicially disabled or hampered from pursuing full judicial remedies. Moreover, the Court in these cases was unreceptive to the contention—mirrored in the decision of the court below—that trustee actions should be disallowed because other parties such as participants or employees might serve as plaintiffs to avenge the same interests.

D. The Court Below, in Denying the Trustees a Cause of Action Based on the Judicially Created Doctrine of Remoteness, Failed to Follow this Court's Precedent.

This Court has made clear in both RICO and antitrust cases that proximate cause analysis does not consist of "'a black-letter rule that will dictate the result in every case.'" *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 274 n.20 (1992) (quoting *Associated Gen. Contractors v. California State Council*, 459 U.S. 519, 536 (1983) ("*AGC*")). The "directness" or "indirectness" of an injury for proximate cause purposes is a function of three interrelated policy considerations which motivate the doctrine. First, the more indirect an injury, the more difficult it will be for a court to distinguish damages attributable to the violation from those attributable to independent causes. *See Holmes*, 503 U.S. at 269; *AGC*, 459 U.S. at 542-43. Second, the more indirectly injured a plaintiff, the more the risk that the court may be forced to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury. *See Holmes*, 503 U.S. at 269: *AGC*, 459 U.S. at 543-44. Finally, when there exist logical plaintiffs more directly injured by the harmful conduct, there is less of a risk that the wrong will go unremedied. *See Holmes*, 503 U.S. at 269-70; *AGC*, 459 U.S. at 541-42.

The Court noted in *Holmes* that the term "direct" is simply a reference to the proximate cause inquiry informed by the considerations set forth above. 503 U.S. at 274 n.20. Thus, "direct injury" is not a litmus test, but merely a label attached to harms deemed remediable in light of the three identified policy concerns. The underlying question is not whether an injury is "direct" or "indirect," but whether it is sound judicial policy for a claim to be allowed.

To date, the courts of appeals undertaking the policy analysis mandated by *Holmes* and *AGC* have concluded that smokers are the only plaintiffs who should be allowed to sue to recover the costs of treating smoking-related disease, and that funds "must lose" if they sue on RICO and antitrust grounds because they were supposedly "not deceived" and unfairly seek to avoid contributory negligence, assumption of risk, and other traditional tort defenses asserted by tobacco companies against smokers. *See, e.g., International Bhd. of Teamsters Health Fund v. Philip Morris*, 1999 WL 1034711 (7th Cir. Nov. 15, 1999), at *3. That conclusion is an affront to the facts pleaded in the funds' complaints and contrary to this Court's standing precedents. The funds have pleaded how the tobacco industry extended its pattern of deception well beyond smokers. The industry recognized the danger to its markets posed by efforts to improve health through reducing smoking rates undertaken by government officials, medical associations, health payors, employers, and labor unions—and accordingly those groups, including the fund plaintiffs in these cases, were chosen by the tobacco industry as targets for deceptive and anti-competitive misconduct. The notion that all claims against the tobacco industry must be subject to "traditional defenses" applicable to tort claims ignores the very purpose of RICO—in the words of this Court, to "supplement old remedies" available under existing tort laws. *Sedima v. Imrex Co.*, 473 U.S. 479, 498 (1985). If the funds are to be deprived of standing to sue under RICO and antitrust because courts of appeals insist that these traditional defenses must be held inviolate when smoking-related injuries are at issue, then the whole congressional purpose in enacting the later statutes is undone.

The specific policy considerations set forth in *Holmes* and *AGC* also favor allowing the Taft-Hartley trusts their

causes of action. First, any difficulties in calculating the funds' damages will not be a function of "indirectness" or difficulty in separating out other injury-causing factors. The funds assert that they have incurred increased and unnecessary tobacco-related health care costs as a direct result of the tobacco companies' intentional and wrongful acts, which were targeted at the funds themselves. The trustees should be allowed to present their proof on these issues, not barred at the door.

The second factor, risk of multiple recovery, should pose no obstacle to this important action. The costs incurred, and damages suffered, by Taft-Hartley plans are recoverable by the plans alone. The personal injury costs to participant smokers are likewise not recoverable by the funds. Since the entire purpose of the trust is to fund the medical costs of participants, the trustees have a right and duty to seek redress when medical costs (and the financial health of the fund) are adversely affected by the intentional and wrongful acts of others. Accordingly, the risk of multiple recovery is minimal or nonexistent.

Finally, but most significantly, there are *no* other potential "private attorneys general" available to redress injuries to fund assets. Participant smokers—whose cost of tobacco-related medical expenses has been paid by the funds—have no individual incentive to prosecute actions relating to these losses. And under common law trust principles, *only* the trustees have the standing to assert these claims in the first instance. In these circumstances, the likelihood that these harms will go unremedied if a cause of action is not allowed is not merely a risk, it is a virtual certainty.

CONCLUSION

Should the decision below be upheld, the public interest in the soundness of multiemployer medical plans would be badly disserved. This and similar rulings from other circuits threaten to seriously erode the well-established principle that Taft-Hartley trustees are the proper parties to vindicate the federally recognized interest in the soundness of these funds. The common law of trusts, which ERISA incorporates, bestows on the trustees the clear right to pursue tort actions and other legal claims stemming from damages to the trust. The "remoteness" rulings by these lower courts raise a judicially created bar that is flatly contrary to the strong policy favoring unfettered rights of action by Taft-Hartley trustees. If allowed to stand, these unfortunate decisions will seriously erode the ability of multiemployer plans to protect and preserve the assets that fund the health care of millions of citizens.

Respectfully submitted,

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